IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.03.2002

Coram :

THE HONOURABLE MR. JUSTICE P. SHANMUGAM

and

THE HONOURABLE MR. JUSTICE P. THANGAVEL

H.C.P. No.1486 of 2001

In the matter of the detenu SAHUL HAMEED

MRS. MOHAMED SARA BEEVI .. PETITIONER

Vs.

1. THE STATE GOVERNMENT OF [RESPONDENT/S]
TAMIL NADU, REP.BY ITS
SECRETARY, PUBLIC (S.C.) DEPT.,
FORT ST.GEORGE,
CHENNAI-600 009.

2. THE UNION OF INDIA REP.BY
ITS SECRETARY, MINISTRY OF
FINANCE, DEPARTMENT OF REVENUE,
NEW DELHI 110 001.

3. THE SUPERINTENDENT OF
CENTRAL PRISON,
CHENNAI-600003.

PRAYER : Petition under Article 226 of the Constitution of India, praying that in the Circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of Habeas Corpus calling for the records leading to the detention of SAHUL HAMEED under Section 3(1)(I) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974) vide detention order dated 18/06/01 on the file of the first respondent herein made in G.O. No.SR.I/570-7/2001 Public (SC) Department and quash the same as illegal and consequently direct the respondents herein to set the

said detenu at liberty from the Central Prison, Chennai.

ORDER : This Habeas Corpus Petition coming on for hearing, upon perusing the petition and the affidavit filed in support thereof and upon hearing the arguments of Mr. M. Abdul Nazeer, Advocate for Petitioner and of Mr. I. Subramaniam, Public Prosecutor for respondents 1 and 3 and Mr. Su. Srinivasan, ACGSC for the second respondent, this court passed the following order :-

: O R D E R
P. SHANMUGAM, J.

The wife of the detenu has filed the above Writ Petition for the issue of a Writ of Habeas Corpus to quash the order of detention dated 1 8.6.2001 passed under Section 3(1)(I) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974) and to produce the detenu and set him at liberty. 2. The facts of the case are stated as follows : The detenu claims to be a dealer in salt fish, tea powder and that he went to Singapore for business purposes. He arrived at Chennai Airport by a Singapore Flight on 11.5.2001. He declared the goods brought by him as 300 numbers of calculators and 200 numbers of adapters of the value of Rs.1 lakh and the number of baggages as one hand bagage and three checked-in baggages. He was intercepted by the officials of the Directorate of Revenue Intelligence and on checking the baggages, they contained electronic goods having a total C.I.F. value of Rs.11,58,200/- and a market value of Rs.18 lakhs approximately. The goods were seized under a mahazar dated 11/12.5.2001, since they were in trade quantites not declared and brought to India by way of smuggling, with an intention to evade payment of customs duty. In his voluntary statement, the detenu is said to have admitted that he has been regularly visiting Singapore for bringing foreign goods for sale in India for profit and that he used to carry Indian/Foreign currencies on his journey from Chennai to Singapore for procuring goods and also on obtaining loans at Singapore. The detenu was arrested on 12.5.20 01 and was remanded to judicial custody by the Additional Chief Metropolitan Magistrate (E.O.II). The detenu had sent a representation dated 18.5.2001 to the Senior D.R.I. Officer, Commissioner of Customs alleging that he was falsely implicated and that the statement obtained on 12.5.2001 was false. He has also submitted that he is prepared to pay the customs duty on the goods or he may be permitted to reexport the goods to Singapore. The said representation was considered by the D.R.I. and in their reply dated 28.5.2001, they have stated that the averments of the detenu and the allegations are baseless, unsustainable and have been made as an after-thought on subsequent realisation of the implications of his voluntary statement and the consequences of the offence in which he is involved. It is also stated that the detenu did not make any complaint of ill-treatment before the learned Magistrate. While the detenu was a remand

prisoner, the impugned order of detention dated 18.6.2001 came to be passed with a view to prevent the detenu in indulging in prejudicial activities which amount to smuggling. The writ petition is against this order.

3. The detenu received a show cause notice under Section 124 of the Customs Act from the D.R.I. dated 23.7.2001 to show cause as to why the goods should not be confiscated under Sections 111(d), 111(l) and 111(m) of the Customs Act, 1962 and a penalty should not be imposed on him under Section 112(a) of the Customs Act. The detenu has submitted his reply dated 3.8.2001 to the Commissioner of Customs. In the meanwhile, the Advisory Board (COFEPOSA), reference under Section 8(b) of the Act, fixed a personal hearing on 31.7.2001 as per their notice dated 6.7.2001. The D.R.I. as well as the detenu had been requested to appear with the connected records. Subsequently, the meeting of the Board was adjourned to 6.8.2001. The detenu submitted a representation to the Board dated 6.8.2001. The Board, by their order dated 6.8.2001, opined that there is sufficient cause for detention of the detenu. The Government confirmed the order of detention in G.O. Rt.3766 dated 5.9.2001 after considering all the materials, including the grounds of detention, the representation dated 6.8.2001 presented by the detenu before the Board and the representation of the wife of the detenu dated 10.8.2001.

4. The main submission of Mr. Abdul Nazeer arguing on behalf of the petitioner is that the non-placement of the show cause notice and the reply to it before the Advisory Board and the Government and the consequent failure to consider there documents before passing the order of detention has vitiated the entire proceedings. His another submission was that the detenu was not

permitted to be represented by a counsel before the Advisory Board and hence the proceedings of the Advisory Board are violative of Article 14 of the Constitution of India.

5. Learned Public Prosecutor on the other hand submitted that the reply to the show cause notice dated 3.8.2001 could not be placed before the Board since 4.8.2001 and 5.8.2001 were holidays being Saturday and Sunday and as the Board concluded the matter on 6.8.2001, practically there was no time for the authorities to place these materials before the Board. He further submitted that there is no provision in the Act for the presence of the lawyer of a detenu while appearing before the Advisory Board and that the Advisory Board consisting of three Judges of the High Court has considered the matter in accordance with law.

6. We have heard the counsel for the petitioner and the learned Public Prosecutor, gone through the records and considered the matter carefully.

7. On the main point of non-placement of the show cause notice along with the reply to it before the Advisory Board and the Government, it is seen that the show cause notice dated 23.7.2001 issued by the D.R.I. was received by the detenu on 28.7.2001. The detenu had submitted his reply through his counsel and it was received by the Commissioner of Customs dated 3.8.2001. As seen, the meeting of the Advisory Board which was initially scheduled to be held on 31.7.2001 was adjourned to 6.8.2001. The detenu appeared before the Board on 6.8.2001 along with his wife and submitted a written representation dated 6.8.2 001. Before processing the reply to the show cause notice dated 3.8.2001, reasonable time must have been given to the D.R.I. to place the same, if it is material, before the Board. As we have seen earlier, the Advisory Board meeting was earlier scheduled to be held on 31.7.2001 and was later adjourned to 6.8.2001. 4.8.2001 and 5.8.2001 were holidays, being Saturday and Sunday and as rightly pointed out by the learned Public Prosecutor, it could not have been possible for the respondents to place these materials before the Board on the said date. The stand taken by the respondents in their counter is that both are independent proceedings. In the absence of reasonable time, the failure cannot be said to be fatal insofar as this case is concerned. It is pertinent to note that neither the detenu nor his representation dated 6.8.2001 refers to the show cause notice. On the other hand, by going through the show cause notice, we find that all the averments of the detenu in reference to mahazar and the denial of his involvement are found in his representation dated 6.8.2001 as well as his previous representation dated 18.5.2001 sent to the D.R.I., which was replied to by the D.R.I. dated 28.5.2001. Thus, the Board had considered the detention order, wherein the representation of the detenu dated 18.5.2001 and the reply of the D.R.I. dated 28.5.2001 and the retracted statement of the detenu and therefore, we are of the view that there is nothing new in his reply to the show cause notice, in reference to the adjudication proceedings of the goods, and even assuming for the sake of argument, we find that non-placement of this reply to the show cause notice has, in no way, prejudiced the right of the detenu.

8. In reference to this point, counsel for the petitioner referred to a number of authorities. Learned Public Prosecutor also referred to a number of decisions to hold that these are not relevant and material necessary to have been placed before the Board on merits. We do not find it necessary to go into it since we have taken the view that there was no time left for the authorities to place the reply to their show cause notice before the Advisory Board.

9. On the next question that these two materials were not placed before the Government before the confirmation of the detention order, the same has been squarely answered by the Supreme Court in its decision rendered in VIJAY KUMAR VS. UNION OF INDIA

(A.I.R. 1988 S.C. 934), wherein their lordships have held that the expression 'as it thinks fit' found in Section 8(f) of the COFEPOSA Act indicates that the concerned authority, after considering the report of the Advisory Board, may fix any period of detention. The authority is not required to give any special reason either for fixing a shorter period or fixing the maximum period prescribed under Section 10 of the Act. Their lordships further observed as follows :

"The opinion of the Advisory Board and the grounds of detention are the only basis for confirming and continuing the detention for any period, even after the maximum period prescribed." (emphasis added)

Their lordships also held that the detention order may, at any time, be revoked or modified and when the power to revoke the order of detention could be exercised at any time, it is not necessary for the authority articulate special reasons for continuing the detention for any period, much less for the maximum period prescribed under the Act.

10. In A. VELLANAI VS. COLLECTOR AND DISTRICT MAGISTRATE, TIRUNELVELI (1984 CRIMINAL LAW JOURNAL 68), a Division Bench of our High Court dealing with a detention order held that the detaining authority is obliged to forward all the subsequent material having a bearing on the matter to the Government and to the Board. In that case, the court was concerned with the retracted statements. When the order of detention was passed on the basis of the materials set out in the grounds of detention including the statements of the witnesses made before the police officer. However, when those witnesses subsequently totally repudiated their alleged statements before the police officer, these statements ought to have been placed before the detaining authority. However, in that case, the detaining authority failed to forward those statements to the Government and did not appraise the Government of the receipt of the said sworn statements of repudiation. In that context, it was held that the failure on the part of the detaining authority to forward the subsequent sworn statements of repudiation to the Government and to the Advisory Board has vitiated the detention order. According to the Division Bench, if those statements were made available before the Advisory Board, the Board would have considered them while giving its opinion as to whether there was sufficient cause for detention or not. This judgment will not apply to the facts of the case on hand for the reason that we are not concerned with the non-placement of the material before the Board. Secondly, the material document being a retracted statement and as the original detention order was passed on grounds of detention including the statement of witnesses made before the police officer, the subsequent retracted statement has got a vital bearing on the matter in issue in order to sustain the order of detention.

11. A Constitution Bench of the Supreme Court in H. SAHA VS. STATE OF WEST BENGAL (A.I.R. 1974 S.C. 2154), while considering the constitutional validity of the Maintenance of Internal Security Act, 1971, held that preventive detention and prosecution are not synonymous. The purposes are different. The authorities are different. The nature of proceedings is different. In a prosecution, an accused is sought to be punished for a past act. In preventive detention, the past act is merely the materials for

an inference about the future course of probable conduct on the part of the detenu. While setting out the principles broadly, their lordships observed as follows :

"The principles which can be broadly stated are these. First, merely because a detenu is liable to be tried in a criminal Court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act. Second, the fact that the Police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention. Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satis faction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order. Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order. Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."

In SAHEB SINGH DUGAL VS. UNION OF INDIA (A.I.R. 1966 S.C. 340), the Supreme Court repelled the contention that the detention order was malafide inasmuch as it is had been made after the authorities had decided to drop crucial proceedings because of the inability to get sufficient evidence to secure conviction and held that the said circumstances were not sufficient to lead to the inference that the action of the detaining authority was malafide.

12. In PRAKASH CHANDRA MEHTA VS. COMMISSIONER AND SECRETARY, GOVERNMENT OF KERALA (A.I.R. 1986 S.C. 687), while considering a case under COFEPOSA, their lordships held that preventive detention, unlike punitive detention which is to punish for the wrong done, is to protect the society by preventing the wrong being

done. Their lordships observed as follows :

"Though such powers must be very cautiously exercised not to undermine the fundamental freedoms guaranteed to our people, the procedural safeguards are to ensure that, yet these must be looked at from a pragmatic and common sense point of view." .....
"The purpose of exercise of all such powers by Government must be to promote common well being and must be to subserve the common good. It must, therefore, be necessary to protect the individual rights insofar as they are practicable and which are not inconsistent with the security and well being of the society. Grant of power imposes limitation on the use of the power. There are various procedural safeguards and you must construe those in proper light and from pragmatic common sense point of view. We must remember that the observance of written law about the procedural safeguards for the protection of individual is normally a high duty of public official, but in all circumstances not the highest. The law of self-preservation and protection of the country and national security may claim in certain circumstances, higher priority."

Applying the above principle, it is seen that the detaining authority is well aware of the fact, as set out in paragraph 3 of the order, that adjudication proceedings and prosecution proceedings are likely to be initiated against the detenu under the Customs Act, 1962 and therefore, the show cause notice issued to the detenu in furtherance of the adjudication proceedings was within the knowledge of the detaining authority. Even if any orders had been passed in those adjudication proceedings, in the light of the above principle laid down, they are independent of the detention orders and the confirming authority was fully aware of the continuance of the adjudication proceedings.

13. In Writ Petition No.9706 of 1989 dated 25.4.1990, it was held that the failure to place the crucial complaint file before the confirming authority has caused prejudice to the rights granted to the petitioner. The said view is distinguishable as in the case on hand, it is only a show cause notice for adjudication in reference to the materials seized from the detenu. In H.C.P. No.603 of 1997 dated 25.2.199 8, a Division Bench of this Court has taken the view that the sanction under Section 137 of the Customs Act to prosecute the detenu by a competent criminal court and the criminal complaint are valid documents which ought to have been placed before the Government and there were four days at the disposal of the authorities to place it before the Government at the time of confirmation of the detention. This case also, in our view, is distinguishable in that it cannot be stated that the show cause notice and the reply are valuable documents that ought to have been placed before the confirming authority in the context of the observations of their lordships in VIJAY KUMAR VS. UNION OF INDIA (A.I.R. 1988 S.C. 934).

14. On the second question of failure to permit the detenu to be represented by a counsel before the Advisory Board, the Act does not provide for such a procedure. In STATE OF ANDHRA PRADESH VS. B. SUBBARAJAMMA (A.I.R. 1989 S.C. 389), the Supreme Court held that the Advisory Board has got a duty to see that the case of the detenu is not adversely affected by the procedure it adopts. It must be ensured that the detenu is not handicapped by the unequal representation or refusal of access to a friend to represent his case. In JOHNEY D' COUTO VS. STATE OF TAMIL NADU (A.I.R. 1988 S.C. 109), it was held that the Advisory Board, of course, has to be careful in permitting assistance of a friend to a detenu in order to ensure due observance of the policy of law that a detenu is not entitled to representation through a lawyer. The Supreme Court held that what cannot be permitted directly should not be allowed to be done in an indirect way. We find from the materials that the detenu appeared along with his wife and had not sought for his friend to appear on his behalf or that no high ranking official represented the department so as to hold that there was unequal representation before the Advisory Board.

15. For all these reasons, we do not find any ground to interfere with the detention order. The writ petition therefore fails and it is accordingly dismissed. No costs.

Index : Yes (P.S.M.J.) (P.T.J.)
14..03..2002
Internet : Yes

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To

1. THE SECRETARY TO GOVERNMENT, PROHIBITION AND EXCISE DEPARTMENT, FORT ST. GEORGE, CHENNAI-9.

2. THE SECRETARY TO GOVERNMENT, PUBLIC (S.C.) DEPARTMENT, FORT ST.GEORGE, CHENNAI-600 009.

3. THE JOINT SECTRETARY TO GOVERNMENT, PUBLIC (LAW & ORDER), FORT ST. GEORGE, CHENNAI-600 009.

4. THE UNION OF INDIA REP.BY ITS SECRETARY, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, NEW DELHI 110 001.

5. THE SUPERINTENDENT OF CENTRAL PRISON, CHENNAI-600003. (In duplicate for communication to the detenu)

6. The Public Prosecutor, High Court, Chennai-600 104.